IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

CITY OF JACKSON, TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 02-1016
	)	
MARTTY GOLF MANAGEMENT, INC.,	)	
CHRIS SPARKS, KEN SMITH, and	)	
KERI LEIGH HARRISON,	)	
	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Plaintiff, the City of Jackson, Tennessee, filed this action for breach of contract, conversion, and fraud on November 30, 2001, in the Chancery Court of Madison County, Tennessee. Martty Golf Management (MGM), a defendant in this case, removed the action to this court by filing of its notice of removal on January 28, 2002. Plaintiff responded by filing a motion to remand or, in the alternative, for leave to amend. Plaintiff argues that the action was improperly removed under 28 U.S.C. § 1441. Plaintiff also claims that this court does not have diversity jurisdiction because Defendant Keri Harrison is a resident of Tennessee. Defendants responded by alleging that the action was properly removed pursuant to 28 U.S.C. § 1441 and by arguing that Plaintiff fraudulently joined Defendant Harrison to

evade this court's diversity jurisdiction.

Facts

In its complaint, Plaintiff alleges that on December 7, 1999, Plaintiff and MGM signed an agreement whereby MGM agreed to manage and care for the Bent Tree Golf Course, its facilities, and its equipment. Complaint, ¶ 9. Plaintiff alleges that MGM breached this contract in that it failed to maintain various components of the course. See id., ¶ 12. Further, Plaintiff states that numerous items were stolen from the course and that MGM is responsible for this conversion. See id., ¶¶ 21-22. More importantly, Plaintiff alleges that Keri Harrison, an employee of MGM and a defendant in this action, embezzled funds from the golf course. See id., ¶ 23.

MGM's notice of removal elaborates upon the circumstances surrounding Defendant Harrison's embezzlement from the course. MGM's notice of removal states that any amount embezzled by Defendant Harrison has been repaid to Plaintiff by MGM and that this repayment constituted a settlement or an accord and satisfaction of Plaintiff's conversion claim against Defendant Harrison. See Notice of Removal, ¶ 9. In support of MGM's contentions, it attached to its notice of removal an affidavit of Allison Heltz concerning the embezzlement by Defendant Harrison. See Affidavit of Allison Heltz. This affidavit states that MGM repaid Plaintiff for Plaintiffs losses due to the embezzlement of Defendant Harrison. See id., ¶ 5.

Removal Jurisdiction

Twenty-eight U.S.C. § 1441 allows defendants to remove actions originally filed against them in state court if the "district courts of the United States have original jurisdiction." 28 U.S.C. § 1441 (a). Although the requirements for removal jurisdiction in § 1441 relate back to original jurisdiction requirements, diversity jurisdiction pursuant to an original filing in federal court under § 1332 is broader than diversity jurisdiction in a removal context pursuant to § 1441. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)(citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-290 (1938)); Hurt v. Dow Chemical Co., 963 F.2d 1142 (8th Cir. 1992) (stating that "Title 28 U.S.C. § 1441(b) makes diversity jurisdiction in removal cases narrower than if the case were originally filed in federal court by the plaintiff"). When seeking to remove a case, a defendant shoulders the burden of proving original jurisdiction in the federal court. See Long v. Bando Mfg. of America, Inc., 201 F.3d 754 (6th Cir. 2000).

Twenty-eight U.S.C. § 1332 gives a federal district court original jurisdiction in cases where the sum in controversy exceeds $75,000 and when the suit is between citizens of different states. See 28 U.S.C. § 1332. To prevent plaintiffs desiring to stay in state courts from frivolously joining a non-diverse party, the United States Supreme Court created a fraudulent joinder exception to 28 U.S.C. § 1332. See Wecker v. Nat'l Enameling and

Stamping Co., 204 U.S. 176, 185-86 (1907). When a plaintiff frivolously joins a non-diverse defendant, the fraudulent joinder exception requires the court to look beyond the fraudulently joined same-state defendant and—if there are no other non-diverse defendants—assert jurisdiction. See Coyne v. American Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999).

To prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against the non-diverse defendants under state law. See Coyne, 183 F.3d at 493 (citing Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir.1994)). When making this determination, "[t]he district court must resolve 'all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non-removing party.'" Coyne, 183 F.3d at 493 (quoting Alexander, 13 F.3d at 949). If there is any doubt concerning removal or even a colorable basis for recovery against a non-diverse party, the court must remand the cause to the state court. See Coyne, 183 F.3d at 493; Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999).

In the case at hand, the parties do not dispute that the amount in controversy exceeds $75,000, and that the only non-diverse defendant is Defendant Harrison. Accordingly, the court's resolution of the diversity jurisdiction issue hinges upon whether Plaintiff has presented a colorable basis for recovery against Defendant Harrison.

Plaintiff's complaint alleges that Defendant Harrison embezzled funds from the course and that MGM has not fully repaid Plaintiff for the embezzlement of Defendant Harrison.

See Complaint, ¶ 23. Taking the complaint in the light most favorable to Plaintiff, it has presented at least a colorable claim against Defendant Harrison for conversion. Accordingly, the court finds that the complaint states a cause of action against Defendant Harrison.

Of course, the complaint alone does not resolve the issue of fraudulent joinder. When attempting to prove fraudulent joinder, a removing party is allowed to present evidence to prove that the plaintiff does not have a colorable basis for recovery against the non-diverse defendants. See Coyne v. American Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999); Salisbury v. Purdue Pharma, L.P., 166 F.Supp.2d 546. 549 (E.D.Ky. 2001). Accordingly, the court can review evidence beyond the complaint in making its determination concerning the potential validity of a plaintiff's cause of action.

In support of its motion for remand, MGM argues that any amount embezzled by Defendant Harrison has been repaid to Plaintiff by MGM and that this repayment constituted a settlement of or an accord and satisfaction of Plaintiff's conversion claim against Defendant Harrison. See Notice of Removal, ¶ 9. The affidavit of Allison Heltz states that MGM repaid Plaintiff in full for Plaintiff's losses due to the embezzlement of Defendant Harrison. See Affidavit of Allison Heltz, ¶ 5. Her affidavit is apparently based upon her interpretation of two letters faxed between Plaintiff and MGM on September 4, 2001.

The first letter is from Ron Barry, Chief Administrator of the City of Jackson's Department of Public Works/Recreation and Parks to Allison Heltz, Office Manager at MGM. See Aff. of Allison Heltz, Exhibit 1A. This letter states:

> Allison,
>
> I have talked with Karen Bell, head of our Accounting Department and currently also our Internal Auditor. She has agreed to forward the following amounts to Martty Golf Management this week:
>
> $ 22,144.80 (unpaid Bent Tree invoices)
>
> $ 10,279.84 (payroll for Aug 20-Sept 2, 2001)
>
> -$ 1,874. 17 (subtracting amount owed City by Keri Harrison)
>
> Total to MGM: $30,550.47 . . .

See id.

The second letter is Ms. Heltz's response to the first letter. Ms Heltz's responded in the following manner:

> Dear Ron,
>
> . . . I spoke with George in regard to the $1,874.17 still due to the city, we agree that MGM will be responsible for collecting the money from the defendant and we agree that it should be deducted from the amount due MGM. . . .

See Aff. of Allison Heltz, Exhibit 1B.

The parties have presented no other evidence to the court concerning the possible settlement of conversion claim against Defendant Harrison. Although it appears as though the letters address the total "amount owed City by Keri Harrison," it cannot be certain that

Plaintiff was fully aware of the extent of Defendant Harrison's conversion on September 4, 2001, the date on both of the above described letters. In its complaint, Plaintiff alleges that it has not been fully compensated for the wrongful conversion by Defendant Harrison and, on the basis of these two letters, the court cannot determine otherwise. See Complaint, ¶ 23.

Of course, if the two letters constitute an accord and satisfaction or a settlement of the claims between Plaintiff and Defendant Harrison then the issue of whether Plaintiff has been fully compensated is irrelevant. Under Tennessee Law, "the scope and extent of a release depends on the intent of the parties as expressed in the instrument." Cross v. Earls, 517 S.W.2d 751, 752 (Tenn. 1974). In the case at hand, there is no instrument of release, just two letters, neither of which indicate that Plaintiff intended to relinquish its claims against Defendant Harrison. Accordingly, the court finds that it is unlikely that the Tennessee courts would find these two letters to be a release or settlement of Plaintiff's claims against Defendant Harrison.

MGM also asserts that the $1,874.17 setoff by the city constituted an accord and satisfaction of Plaintiff's conversion claim against Defendant Harrison. The Tennessee Court of Appeals has recently set forth the specific requirements for the affirmative defense of accord and satisfaction to apply. In Sanders v. Sanders, —F.3d— (Tenn.Ct.App. 2001) the court stated:

> The defense of accord and satisfaction is an affirmative defense, and the burden of proving this defense rests squarely on the party asserting it. To make out an accord and satisfaction defense, the party asserting it must

> demonstrate that a creditor has agreed to accept a compromise amount, in complete satisfaction of a claim. To constitute an enforceable accord and satisfaction, it is essential (1) that the tendered consideration [is] offered to extinguish the original obligation, (2) that the debtor intend[s] the tendered consideration as complete satisfaction for the original obligation, (3) that the debtor's intent be made known to the creditor, and (4) that the creditor accepts the tendered consideration with the understanding that it completely satisfies the original obligation.

Sanders v. Sanders, —F.3d— (Tenn.Ct.App. 2001)(citations omitted).

In the context of this case, it is questionable whether Tennessee courts would consider the letter sent by Ron Barry to be an offer to extinguish the obligation of Defendant Harrison. Although the letter states that Defendant Harrison owed the city a specified amount, the letter did not mention a release of Defendant Harrison's obligations to Plaintiff. In any event, neither letter evidenced any intent to relieve Defendant Harrison's obligations to Plaintiff—an essential requirement of all four elements of an accord and satisfaction defense. See id. Accordingly, the court finds that under Tennessee law it is doubtful that these two letters could constitute an accord and satisfaction or a settlement of Plaintiff's conversion claim against Defendant Harrison. Since questions of state law must be resolved in favor of the non-removing party, the court must find that Plaintiff's conversion action against Defendant Harrison was not extinguished by a settlement or accord and satisfaction. See Coyne, 183 F.3d at 493.

Conclusion

The court finds that, under Tennessee law, Plaintiff has presented at least a colorable

claim against Defendant Harrison. Though it is possible that the Plaintiff's claim against Defendant Harrison may ultimately result in judgment for Defendant Harrison, it is not within this court's jurisdiction to make that determination. Accordingly, Plaintiff's motion for remand is GRANTED. Since the court is without jurisdiction in this action, it will not rule on Plaintiff's motion to amend its complaint. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

_____

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____

DATE